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In the Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 625

CECIL I. HUST,
Petitioner and
Plaintiff-Respondent below,

v.

MOORE-McCORMACK LINES, INC.,
Respondent and
Defendant-Appellant below.

SECOND BRIEF OF RESPONDENT MOORE-McCORMACK LINES, INC., ON THE MERITS, PRINCIPALLY TO ANSWER QUESTIONS RAISED BY THE COURT ON THE ORAL ARGUMENT

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Since this brief is written under pressure of time, we shall not attempt to answer every point made in Petitioner's Reply Brief, nor in the briefs of the amici. Most of those points have been already covered in our briefs already filed, and as to others the answers are obvious. If any require attention we shall notice them. But this brief is, in the main, directed to answering the specific points raised by the Court at the last oral argument.

FIRST: AUTHORITY OF WAR SHIPPING ADMINISTRATION TO OPERATE VESSELS AND TO CONTRACT FOR SERVICES OF GENERAL AGENTS UNDER G.A.A. FORM OF CONTRACT.

We believe the authority of the W.S.A., an emergency war-time office of the Executive Office of the President to operate vessels and contract for services of general agents, has not heretofore been questioned.

The W.S.A. was created February 7, 1942, two months after Pearl Harbor, by Executive Order of the President, acting by virtue of his authority as President and Commander in Chief of the Army and Navy. Executive Order 9054, Feb. 7, 1942, Amended by Executive Order 9244, Sept. 16, 1942.

Section 3 of Executive Order 9054 provided that

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission *with respect to the operation . . . . of vessels . . . .* under (citing various Acts and Executive orders) and under any other provisions of law, including Executive Orders, *are hereby transferred to the Administrator.*"

Also under Section 2(i), with respect to all matters for which the Administrator was responsible, he was given the authority with respect to contracts, conferred by Executive Orders 9001, 9127, and § 403 of the Public Law 528, 77th Congress.

We shall now summarize the sources of the au-

thority which was thus transferred to the War Shipping Administrator.

The powers of the Maritime Commission under the Merchant Marine Acts of 1920 and 1936, with respect to the operation of vessels, are well known to the Court. More important are the following sections:

Merchant Marine Act, 1920, as amended, Section 7, which authorized the United States Shipping Board first to *sell* vessels, and if unable to sell, to *charter*, and if unable to make a satisfactory sale or charter, to *operate* vessels;

Merchant Marine Act, 1920, as amended, Section 12, providing "That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise . . . .";

Merchant Marine Act, 1936, as amended, Section 204, which transferred powers of the Shipping Board to the Maritime Commission;

Merchant Marine Act, 1936, as amended, Sections 704, 705, 706(a), and 707(c).

These provide for chartering vessels to private operators, and permit operation of vessels for account of the Commission by private operators on a temporary basis, such operation to be discontinued after one year. Section 707(c) permits temporary operation by the Commission pending a readvertisement for bids for charter.

Now, it will be observed that under these Acts, the national policy was for private operation and opposed to the government keeping in the business of operating ships. The powers of the Commission to operate ships were, therefone, quite limited.

However, two other sections of the Merchant Marine Act of 1936 are of special importance:

Section 902, relating to purchase or requisition of vessels, is applicable only during a national emergency.

Paragraph (e) of this section authorizes the Commission to "repair, recondition, reconstruct, *and operate*, or charter for operation, any property acquired under authority of this section."

This authority became applicable upon the President's declaration of a national emergency.

Most important on the authority to contract is Section 207 (as amended by Act of June 23, 1938) which provides:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, ... , *in the same manner that a private corporation may contract* within the scope of the authority conferred by its charter."

This section further provides that the General Accounting Office shall in its audits "allow credit for all expenditures shown to be necessary because of the na-

ture of such authorized activities, *notwithstanding any existing statutory provision to the contrary.*"

This provision is of special importance because it became applicable to the greatly expanded powers of the Commission under emergency legislation and executive orders.

We shall now enumerate, chronologically, the emergency statutes and executive orders which, for the national defense, greatly increased the authority of the Maritime Commission and transferred it to the War Shipping Administrator.

Public Law 5 (Joint Resolution) 77th Congress, Approved February 6, 1941.

This Act appropriated $350,000,000 to the construction fund of the Maritime Commission primarily for construction of ocean cargo vessels of a type useful in time of emergency. Section 2 made the important provisions of § 207 of the Merchant Marine Act of 1936 (authority to make contracts in same manner as a private corporation) applicable to all activities under Public Law 5. It further authorized the Commission to carry on these activities "without regard to the provisions of Section 355,[1] 3648,[2] and 3709[3] of the Revised Statutes of the United States."

Public Law 101, 77th Congress, Approved June 6, 1941.

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[1]Requiring Attorney General's opinion before purchasing land.
[2]Prohibiting advance payments from public funds.
[3]Requiring advertisement of government contracts.

Section 1 authorized requisition of idle foreign ships in U. S. ports. Section 3(a) authorized the Commission, during the emergency,[1] to *charter any* vessel necessary for the transportation of commodities essential to national defense, notwithstanding any other provision of law, and without regard to Section 3709[2] of the Revised Statutes. Section 4 gives the same authority to *purchase any vessel.*

It then provides:

> "*Such vessels* and *vessels otherwise acquired* by *or made available* to the Commission may be chartered . . . *or operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest,* giving primary consideration to the needs of national defense."

Here is clear authority in broad terms for the Maritime Commission (and later the W.S.A.) to itself operate ships for the national defense on any terms and conditions which it deemed desirable and in the interest of the national defense.

Public Law 247, 77th Congress, approved August 25, 1941, is also very important. This Act should be considered in connection with Public Law 5 previously enacted by the same Congress, and referred to above. Public Law 5 was primarily an emergency ship *construction* act. Public Law 247 increased the appropriation by $698,650,000, to be used for the same pur-

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[1]The original time limitation of June 30, 1942, was extended until after the war by Public Law 610, 77th Congress, June 16, 1942.

[2]Requiring advertisement of government contracts.

poses as Public Law 5, but also:

> "And (4) the purchase, requisition, charter, *operation*, repair, reconstruction, and reconditioning of vessels acquired, or the use or possession of which is acquired by the Act of June 6, 1941 (Public Law 101), *or otherwise*."

Following Pearl Harbor, the Congress passed the First War Powers Act, 1941 (Public Law 354, 77th Congress) approved December 18, 1941.

Section 201 of this Act authorized the President to remove all restrictions on the making of contracts, except for a prohibition against cost-plus-a-percentage-of-cost contracts, and except for laws limiting profits.

The President promptly exercised this authority by issuing the very important Executive Order 9001, December 27, 1941. Title I of this Order is as follows:

> "1. By virtue of the authority in me vested by the Act of Congress, entitled 'An Act to expedite the prosecution of the War effort', approved December 18, 1941 (hereinafter called 'the Act'), and as President of the United States and Commander In Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating

to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or Navy Department or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

"2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders or otherwise), for all types and kinds of things and services necessary, appropriate, or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

"3. The War Department, the Navy Department, and the United States Martime Commission may, by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price, and may enter into agree-

ments with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract should have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

"4. Advertising competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required."

It may be observed that the Maritime Commission was the only civilian agency of the government to be granted this extraordinary authority along with the Army and Navy.

The Attorney General discussed the legislative history of the contract provisions of the First War Powers Act in an opinion to the Secretary of War, August 29, 1942, and pointed out that members of Congress intended the Act to remove every possible limitation on the making of contracts, except that it prohibited cost-plus-a-percentage-of-cost contracts.

Now all of these powers and authority were transferred to the War Shipping Administrator under the President's Executive Order 9054, (amended by 9244),

referred to above.

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission *with respect to the operation . . . of vessels* . . . . are hereby transferred to the Administrator."

Thus the War Shipping Administrator, by this series of emergency acts and executive orders, was given the broadest powers to operate ships and make contracts relating thereto. The history and development of this authority show recognition by the Congress and the President that, for the national defense during the emergency, operation of ships by the government was a necessity. The peace time policy in favor of private operation had to be temporarily abandoned in the interest of the national defense.

The G.A.A. form of agreement, dated April 4, 1942, was drafted by the legal staff of the W.S.A. in the early months of the war. We believe that it was intended to, *and did,* retain full control over the operation of the vessels, and particularly over the master, officers, and crew, in the War Shipping Administration, but utilized the experience of the steamship companies for storing and supplying the vessels, and keeping the accounts of the business of the vessels, as set forth in the agreement itself.

This arrangement for operation of the ships was well known to everyone from the start. The G.A.A. form of contract was published in the Federal Register, and Congress, the W.S.A., the unions, and the

steamship companies, all considered the seamen to be employees of the government. Article 3A(d) was incorporated into the Statements of Policy, and into the union booklets (Petitioner's Exhibit 15).

Congress knew the method of operation and repeatedly approved it.

In the Appropriation Act for the fiscal year ending June 30, 1943 (Public Law 678, 77th Congress, Approved July 25, 1942), the War Shipping Administration's fund was increased $1,100,000,000 for carrying on its functions, "including costs incidental to the acquisition, operation, loading, discharging, and use of vessels transferred for use of any department or agency of the United States." A good many vessels, including many troop transports, were operated by W. S. A., utilizing services of general agents under G.A.A. agreements, on direct assignment to the Army and Navy,[1] and the quoted provision was for the purpose of authorizing payment of costs of operation of these vessels, which otherwise might have been chargeable to Army and Navy appropriations.

The Appropriations Act for the fiscal year ending June 30, 1944, increased the fund by $2,200,000,000 for the same purposes.

Public Law 17 also shows recognition and ap-

[1]See the reference to this in Public Law 17—"The term 'seaman' shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the U. S."

proval by Congress of the method of operation by W.S.A.

This Act, as pointed out elsewhere, repeatedly refers to "officers and members of crews employed as employees of the United States through the War Shipping Administration."

We hope your Honors will read the full House Report on Public Law 17. However, the following excerpts from the House and Senate Reports show complete understanding and approval by Congress of W.S.A.'s operation of the vessels.

From House Report No. 107, 78th Congress, 1st Session, to accompany H.R. 133:

> "This legislation must be considered in the light of the tremendous scope and magnitude of the operations of the War Shipping Administration. The War Shipping Administration is actively engaged in operating what is destined to be the largest merchant marine in the world's history." (Page 12).
>
> "It has become trite to say that this is a war of transportation, since ocean transportation is a limiting factor which will determine the amount of supplies and number of troops that can be transported to the many theaters of active combat. The functions of the Administrator therefore with respect to the operation and control of the American merchant marine and the coordination of its activities with those of our allies constitute one of the most vital civilian activities of the war effort, if indeed it is not the most vital. The activities are so broad and manifold, and the need for efficient emergency action so great, that

the Administrator cannot function with the usual restrictions applicable to Government agencies.

"In section 207 of the Merchant Marine Act, 1936, Congress provided that the Maritime Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. The Administrator, War Shipping Administration, in exercising his functions, duties, and powers operates with like authority under these provisions of the Merchant Marine Act, 1936, and other applicable laws." (Page 13).

"The vessels owned by the War Shipping Administration or under bareboat charter to it are operated by experienced steamship companies as general agents for the Administrator. The agreements between the Administrator and the general agents specifically provide that the general agent shall procure and make available officers and crews for War Shipping Administration vessels 'through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.'

"The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"Shortly after the appointment of the Administrator, he adopted a statement of labor policy in which he specifically provided that 'the provisions of the existing collective bargaining agreements be continued and observed unless changed by mutual agreement.' Accordingly, the seamen employed by the War Shipping Administration through its general agents are entitled to all of the contractual rights of seamen on commercial vessels, including overtime compensation, right to settle disputes through arbitration, special bonuses and penalty provisions, and so forth. By this means, there has been preserved existing labor structures which have been built up in a process of experimentation and evolution, and there has been maintained and utilized for the war effort the experience of responsible organizations and leadership. Although employees of the Government, these seamen are paid by the general agents directly in the same manner as payment is made in commercial operations, the funds for such payment having been lodged in bank accounts maintained by the general agents out of revenues received from the operation or from advances made by the Administrator." (pp. 16, 17).

And from Senate Report No. 62, 78th Congress, Calendar No. 57, to accompany H.R. 133:

"The vessels owned by the War Shipping Administration or under bare-boat charter to it are operated by experienced steamship companies as general agents for the Administrator under supervision and direction of the Administrator's staff which includes many officials drawn from the industry. The agreements between the Administrator and the general agents specifically provide that the general agent shall procure and make available officers and crews for War Shipping Administration vessels—

through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time.

The intention of this provision is to authorize the general agent to procure his seagoing personnel through his customary channels in cases where the general agent had previously operated under union contracts. This provision also avoids favoritism as to conditions between one general agent and another or as between one union and another.

"In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or a commercial organization under the provisions of the Merchant Marine Act, 1936. These activities are so broad and so manifold and the need for emergency action is so great that the Administrator cannot function with the usual restrictions applicable to Government agencies." (Page 4).

We think it abundantly clear from the foregoing that the War Shipping Administrator had authority to operate vessels and enter into general agency agreements, and that the entire arrangement, including the general agency agreement, the method of employing crews, and the fact that the crews were employees of the United States, was recognized and approved by Congress.

We add the thought, however, that even if the W.S.A. had acted *ultra vires*, that fact would not make respondent, who undertook its duties under the general agency agreement in good faith, an employer of the crew.

SECOND: THE LEGISLATIVE HISTORY OF PUBLIC LAW 17 SHOWS THAT CONGRESS CONSIDERED THE SEAMEN TO BE GOVERNMENT EMPLOYEES AND CONSIDERED AND REJECTED A PROPOSAL FOR JURY TRIAL OF INJURY SUITS.

This is the point that Mr. Justice Reed asked us to cover.

Public Law 17 (sometimes known as the Merchant Marine Omnibus Bill or the War Shipping Administration Clarification Act) was first introduced in the 77th Congress, 2nd Session, as H.R. 7424. Hearings were held by the Committee on Merchant Marine and Fisheries on September 2, 1942. The bill was favorably reported by this Committee (H. Report. No. 2572, 77th Congress, 2nd Session), was passed by the House, and was favorably reported by the Senate Committee on Commerce (Senate Report, No. 1655, 77th Congress 2nd Session). Congress adjourned before the bill could be passed, and it was reintroduced in the 78th Congress, 1st Session, as H.R. 133. The House report (Report No. 107, 78th Congress, 1st Session) and Senate report (Report No. 62, 78th Congress, 1st Session) on H.R. 133 incorporate most of their previous reports on H.R. 7424.

Included in the reports are communications from the Federal Security Agency (House Report No. 107, page 32), the U. S. Employees' Compensation Com-

mission (page 33), the U. S. Civil Service Commission (page 38), and the Treasury Department (page 39). All of these show a general understanding on the part of these other government agencies that the seamen were employed by the W.S.A. as government employees, and that they were not private employees.

Before discussing the jury trial issue which arose in the consideration of Public Law 17, we make some general observations on seamen's rights for injuries as they existed *prior* to Public Law 17.

A seaman injured on a privately owned ship has the right to maintenance and cure, and the right to indemnity for unseaworthiness, and also the right to damages for negligence of his employer under the Jones Act.

All of these rights could be enforced in admiralty proceedings, and the right to damages under the Jones Act could be enforced at law with trial by jury.

Now, in the case of a seaman employed on a *merchant* vessel of the United States (as distinguished from a public vessel) he had the same *substantive* rights, including those under the Jones Act, but they could only be *enforced* under the Suits in Admiralty Act, because that was the only procedure by which the sovereign had consented to be sued.

Public Law 17 did not change any of these rights. All it did was (1) to extend the *same* rights of seamen on *merchant* vessels of the United States to seamen on *public* vessels of the United States, and (2)

to require administrative disallowance of the claim before filing suit, in order "to prevent unnecessary or premature litigation against the United States." (House Report, p. 21).

Therefore, we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an *in personam* proceeding in admiralty, or by an action at law with a jury trial. And seamen who were employees of the government on merchant vessels could enforce their substantive rights under the Jones Act only under the Suits in Admiralty Act.

Petitioner's desire to bring his case before a jury, rather than proceed against the United States as his employer in the Admiralty Courts (historically the guardians of the rights of seamen) under the Suits in Admiralty Act, is the only reason for this case being before this Court, for the entire cost of the judgment is born by the United States in either event.

The reports on Public Law 17 show that Congress considered but rejected the jury trial remedy.

At the hearings before the House Committee on Merchant Marine and Fisheries on H.R. 7424, on September 2, 1942, Mr. Haddock, legislative representative, C.I.O. Maritime Committee, presented a statement by Mr. William L. Standard (who has filed brief *amicus curiae* in this case) in behalf of the Na-

tional Maritime Union. It is set forth in full in the report of the Hearings at pages 30-32 inc.

This statement recognizes that seamen employed on vessels operated by the WSA are government employees. Discussing the exclusion of these seamen from the U. S. Employer's Compensation Act, he says "insofar as they were employees of the government." He points out that the seamen through their unions have consistently opposed a Compensation Act, preferring their rights under existing laws.

He then objects to seamen being deprived of a jury trial, and makes this recommendation:

> "The N. M. U., therefore, recommends that, in order that merchant seamen employed by the War Shipping Administration, should not be deprived of a trial by jury, after the word 'Act,' at line 11, page 2, of the bill, the following be inserted:
>
> "'*Provided, however*, That the claimant may, at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action the claimant may enjoy the same rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated vessels.'
>
> "To deprive merchant seamen employed on vessels operated by the War Shipping Administion of the benefit of a trial by jury would be depriving them of a very substantial right."

We are not certain whether Mr. Standard fully understood the provisions of Public Law 17. Part of his statement seems to indicate that he thought Public Law 17 was going to take away a right to jury

trial that then existed. But, as we have said, Public Law 17 took away no right of jury trial against the government, because prior to Public Law 17 no such right existed. And of course Public Law 17 did not purport to take away a right of jury trial against a *private* employer, as, for example, the case of a private owner operating his own vessel, and manning it, under *time charter*.

In any event, Mr. Standard's statement to the Committee directly raised the issue of whether a jury trial should be permitted in the case of seamen injured while employed by the War Shipping Administration.

The Attorney General, Mr. Biddle, took notice of this issue, and gave his views to the Committee in a letter dated September 14, 1942. This letter is printed at page 33 of the Report of the Hearings, Sept. 2, 1942, on H.R. 7424. It is also set forth at page 30 of Mr. Axtell's brief *amicus curiae*.

We quote here only the first two paragraphs:

> "My Dear Mr. Bland: At the hearing, September 2, 1942, on H.R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.
>
> "I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account

in reaching your conclusion on the issue of policy involved."

The Attorney General then discusses four considerations against jury trials in these cases.

The House Committee considered the matter, and the Attorney General's views prevailed. We quote from the Committee's Report (House Report 107, 78th Congress, 1st Session) at page 21,

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness and other casualty to seamen, have been rather fully set forth herein above. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. *In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942).*" (Emphasis supplied.)

Thus Congress considered whether a jury trial should be afforded to seamen employed by the War Shipping Administration, and rejected such procedure for the reasons given by the Attorney General.

Public Law 17—Social Security Tax

Before leaving Public Law 17, we answer briefly a contention made by counsel with respect to social security deductions. They argue that since social security deductions were taken from Hust's pay, he was a private employee, because, they say, no deduction could be taken if he were a government employee, since government employees are not subject to the Social Security Act (Petitioner's Reply Brief on Merits, page 33; Mr. Feeman's Brief, page 10.)

This completely overlooks Section (b) (2) of Public Law 17, which *amended* the Social Security Act so as to include services performed "on or in connection with any vessel by *an officer or member of the crew as an employee of the United States employed through the War Shipping Administration.*" The amendment is made retroactive to Sept. 30, 1941.

See also House Report 107, 78th Congress, 1st Session, on H.R. 133 at page 20, where it is explained that in some cases the deductions had been taken during the past period, and where the Committee points out the desirability of applying the Social Security Act on "bareboated or owned vessels on which the seamen became employees of the United States."

In fact, if the seamen in these cases *were* private employees, as petitioner contends, they would have been subject to the Social Security Act and no legislation on this point would have been necessary. The very fact that Congress, in Public Law 17, thought it necessary to amend the Social Security Act, shows that Congress recognized them as government employees.

THIRD: SINCE THE SHIPPING ARTICLES ARE STATUTORY IN FORM AND ARE ALWAYS SIGNED BETWEEN THE MASTER AND CREW, WHY IS IT SIGNIFICANT THAT THEY WERE SO SIGNED IN THIS CASE? DOES SUCH A SIGNING THROW ANY LIGHT ON THE QUESTION WHETHER THE CREW WERE EMPLOYEES OF THE UNITED STATES?

The requirement of Shipping Articles goes way back to the Act of July 20, 1790. Their purpose was to give certainty to the seaman's contract of employment. The master, in engaging the seamen, acted, and has always acted, for the *owner* of the ship. Sometimes he was an owner or part-owner himself. Mr. Justice Storey, while on circuit, said, in U. S. v. Haines, 5 Mason's Reports, 272, at 275, that the Shipping Articles are "a contract between the seaman and the *owner* through the instrumentality of the master, as agent of the *owner*". (Throughout this brief italics are ours.)

When we said in our previous brief that the crew of this ship, the MARK HANNA, were employees of the United States because they were engaged by the master, likewise an employee of the United States, we had in mind, of course, that the United States was the *owner* of this ship, and that the master was engaging the men for such *owner*.

So that the significant fact attaching to these Articles is that they were between the master, acting for his principal, the *owner of the ship*, on the one side, and the crew on the other.

Indeed, our opponents do not contest the fact that the master, in signing on the crew, engages them for the owner. Our opponents recognize this. As indeed they must. But, forced into this corner, they attempt to escape by a claim that the Agent here was an owner pro hac vice. That claim is refuted by the very title itself of the Agreement, of which Mr. Justice Burton took note at the oral argument. That title is: "Service Agreement for Vessels of Which the War Shipping Administration is Owner or Owner Pro Hac Vice" R. 150. It is obvious that the War Shipping Administration and the Agent cannot *both* be owners pro hac vice on the same ship. And since the Agent's duties are identical under this standard form of agreement, whether the ship be owned outright by the War Shipping Administration or merely owned pro hac vice, it follows that in the case of the ship owned outright, the Agent is still merely an agent. In this very case, both kinds of ships were allocated to the Agent under this one Agreement. Can it be said that as to those owned by the United States pro hac vice, the Agent was a mere agent, but as to the others it was itself an owner pro hac vice? When it performed the identical duties for each? These questions answer themselves.

But we do not need to rely on this title. There are much stronger reasons why the Agent here is not an owner pro hac vice.

In the first place, let us observe that in all the decisions in all the courts which have considered this question, it is always a *charter* which is involved. And the question is always whether the charter is a *letting* or a *hiring,* in the sense of a *demise,* or whether it is a mere contract of affreightment. We do not believe that it has ever been contended, and certainly never decided, that a mere Agency Agreement like this is a demise constituting the Agent an owner pro hac vice.

It is an absolute essential of an ownership pro hac vice that the alleged owner be in sole and *exclusive possession, command* and *control* of the ship. This has been stated by this Honorable Court from the earliest times, and has been consistently adhered to. Thus, in Marcardier v. The Chesapeake Insurance Co., 3 L. Ed. 481, at 484, Mr. Justice Storey said:

> "A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the *exclusive possession, command* and *navigation* of the ship. . . . But where the general owner retains the *possession, command* and *navigation* of the ship, and contracts to carry a cargo or freight for the voyage, the charter party is considered a mere affreightment sounding in covenant and the freighter is not clothed with the character or legal responsibility of ownership."

He held that there was no ownership pro hac vice.

And in Reed v. U. S., 20 L. Ed. 220, Mr. Justice Clifford said:

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character of legal responsibility of ownership. *Donahue v. Kettell*, 1 Cliff. 137; *The Volunteer*, 1 Sumn. 551; *Drinkwater v. The Spartan*, 1 Ware 153; *Gracie v. Palmer*, 8 Wheat. 605; *Clarkson v. Edes*, 4 Cow. 470; *Taggard v. Loring*, 16 Mass. 336; *Christie v. Lewis*, 2 Brod. & B. 410.

"Unless the ship herself is let to hire, and the owner parts with the possession, command and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command and navigation of the ship, is the agent of the general owner, and the mariners are regarded as in his employment, and he is responsible for their conduct. *Putnam v. Wood*, 3 Mass. 481.

"Courts of justice are not inclined to regard the contract as a demise of the ship if the end in

view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

The decision was that there was no ownership pro hac vice.

Again in Leary v. U. S., 20 L. Ed. 756, Mr. Justice Field said:

"There is no doubt that under some forms of a charterparty the charterer becomes the owner of the vessel chartered for the voyage or service stipulated and, consequently, becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case, the charter-party is a contract for the lease of the vessel; in the other,

it is a contract for a special service to be rendered by the owner of the vessel.

"In examining the adjudged cases on this subject we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used in the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."

Here again, as in the previous cases, it was held that there was no demise.

So, again in U. S. v. Shea, 38 L. Ed. 403, the same principles are again stated. The court held here that it *was* a case of hiring,—in other words, a demise, but did so on the express ground that the *exclusive possession, management* and *control* was in the hirer, —in this case the quartermaster's department of the army. The facts were that Shea furnished some boats to the army to run between New York and Governor's Island, and New York and Sandy Hook, and agreed to furnish an engineer and firemen, and if requested, to furnish the remainder of the crew. But he retained no control over them, and the case turned on this finding of fact: "During the term of its use it

was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise—the transfer of the *exclusive possession, management* and *control.*" (Bottom Page 407). The court even repeats this statement on Page 408, saying that "it was wholly in the management and control of the quartermaster department", and again "under the exclusive management and control of the quartermaster's department at the time of the accident". This case is cited by opponents, but it will be seen that it entirely supports our contention that to constitute one an owner pro hac vice he must be in *exclusive management, possession* and *control* of the ship. It must, in effect, be a complete demise.

Opponents cite the Barnstable, 45 L. Ed. 954. The case does not really discuss ownership pro hac vice, nor even use that term. As stated by the court:

> "The question involved in this case is, whether the owners of a vessel, who have let it out upon charter-party and agreed to pay 'for the insurance on the vessel,' are liable, as between themselves and the charterers, for damage done to another vessel by a collision resulting from the negligence of the officers and crew, who are appointed and paid by the charters.

The Court said:

> "As the charterers hired the Barnstable for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes,—the owners

> only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in efficient state during the existence of the charter party,—there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault."

The decision was that the primary liability for the damage to the other ship rested on the charterers, since they had selected and hired the crew and were in complete possession and control, and not on the owners. The decision therefore really supports us.

One more in point, however, is New Orleans-Belize Etc. SS Co. v. U. S., 60 L. Ed. 227. The vessel was chartered by the United States for military purposes in connection with operations around Cuba during the Spanish War. She suffered injuries due to storm and collision. Her owner sued the United States for the damage. The charterparty said that the owner "does hereby grant and let", and a quartermaster of the army "does hereby take" the vessel for certain voyages, and for such longer time as the army might require. Other provisions of the charter are stated in the opinion. Mr. Justice Holmes said:

> "The main contest is upon the question whether by this contract the United States became owner pro hac vice, as affecting the extent of the liability assumed. The claimant relies upon the words 'grant and let' on the one side and 'take' on the other, the fixing of the price at which the United

States may purchase the vessel, the reference to the vessel being 'returned', the contemplation that the need of repairs may be attributable to the fault of the United States, the control of the United States over the destination of the ship, and some details, as showing that the United States was in the place of the owner for the time. But we cannot accept this conclusion. The general owner furnished the crew and a master who at least regarded himself as representing its interests, since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea, etc., excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. . . . ."

The decision was that there was no demise,—that the United States was not an owner pro hac vice. Please note that the decision was against ownership pro hac vice, even though the charter contained the words "grant" and "let", on the one side, and "take" on the other, and provided that at the conclusion of the charter the vessel should be "returned",—all of which refutes counsel's argument that the words "assume control" and "custody" and "turned over", in Articles 11 and 12 of the Agreement, indicate an ownership pro hac vice. (Parenthetically, we may interject here that the language in Article 12 is not that all vessels in the custody of the General Agent shall be turned over but it is that "all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement shall be immediately turned over to the United States". We suggest that

the word "custody" does not qualify the word "vessels", but rather qualifies the words "property of whatsoever kind", such as books of account, moneys, shore supplies and spare parts for vessels and all the innumerable things that such an agent would be keeping in its storehouses for its principal.)

To return, however, to ownership pro hac vice, we have shown from the many decisions of this Court that to constitute such an owner, he must have *exclusive* and *entire command, possession* and *control* over the vessel, including her *navigation*. Bearing in mind these principles, it surely requires no close analysis of the present Agreement to show that it has none of the characteristics of an ownership pro hac vice. It is not a demise. It does not "let" or "hire" the vessel; nor does the Agent "take" the vessel. There is no stipulated rent or charter-hire; the Agent does not pay the United States anything for the vessel. On the contrary, the United States pays the Agent for its services, the amount thereof being left to the discretion of the Administrator. The Agent cannot select the freighters and shippers with whom he would deal; nor the cargoes; nor the voyages; nor the loading berths; nor the stevedores (stevedoring services are performed under a master contract between the stevedore and the War Shipping Administration). The Agent cannot select the master. All it can do is procure one and produce him for the United States to pass on and reject or accept. The Agent cannot hire the crew. He cannot even "procure" the crew for the

master to engage, except as he does it through the "usual channels", i e., the union halls. If the ship performs a salvage service, the Agent can have nothing to do with it and gets no award. Article 10. Indeed, the Agent has no financial interest in the venture at all. None of the vessel's revenue goes to him. He gets some flat fees, variable in the discretion of the Administrator, but which the Administrator prescribed in General Orders 12 and 34 hereafter adverted to. The Agent can hardly turn a hand except as he is "directed" or "ordered" or "instructed" by the Administrator. The practice of the Agent, under this Agreement, is described by Tripp at R. pages 115-119.

With these preliminaries, let us look a little more closely at the Agreement, clause by clause.

Article 1. The Agent is appointed as an agent and not as an independent contractor to manage and conduct the *business* of the vessels. (Note that he does not manage the *vessels* as in some previous agency agreements; he only manages their *business*. The management of the *vessel* is left to the master. Article 3A(d)). Cf. Tripp R. 117, 124, 125.

Article 2. The Agent accepts the appointment. But look how he is circumscribed. He must act only "in accordance with such directions, orders or regulations as the latter (United States) has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided".

Article 3A. The Agent shall to the best of its ability, *but for the account of the United States*, maintain the vessels in trades or services. But what trades or services? In such as the Agent may select? No. Such as "the United States may direct". Can the Agent select voyages, cargo, etc? No. It must act "subject to its (the United States) orders as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels". (In the absence of such orders he may follow reasonable, commercial practices.)

Article 3A(c). "Equip, victual, supply and maintain the vessels subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". If the Agent were an owner pro hac vice, it would be no concern of the United States *how* the agent equipped, victualed or supplied the vessels. The United States would have no interest.

Article 3A(d). We have discussed this fully before. We do not repeat that discussion here. We merely say that the whole clause is entirely incompatible with the idea that the Agent is owner pro hac vice with "*exclusive possession, command* and *control*" of the ship and her *navigation*, as the decisions specify. "Full control, responsibility and authority with respect to the navigation and management of the vessel" is in the master,—"an agent and employee of the United States". The Agent does not hire him;

he merely procures him. The United States may accept or reject him. If the United States accepts him, he is hired by the United States, and in turn hires the crew. We have already shown how little the Agent has to do with this. Cf. too Tripp's testimony, R. 119.

Article 3A(e). We do not quote it. A reading of it will show that an Agent cannot even issue the kind of bill of lading he might choose. The form is dictated by the United States.

Article 5 is the one relating to compensation for the Agent's services. He has no assurance of any; other than it must be "fair and reasonable".

Article 9 relates to general average. Here again the General Agent must "comply with all instructions issued by the United States", etc.

Article 10 concerns salvage. We have already noted it. If the Agent were an owner pro hac vice, he certainly would be entitled to salvage. For if he is going to have the liabilities of an owner, he should have its benefits. But here again, as elswhere through the Agreement, everything is under the "control of the United States".

Article 16(d) is interesting. For if the Agent were an owner pro hac vice, (the commonest form of which is a bareboat charter or a demise), it would be a matter of complete indifference to the general owner whether the Agent obtained officers or crews for the operation of the vessels or not. They could lie idle for all the general owner would care. But this

Article takes care to provide that the General Agent shall not be liable to the United States for any failure to obtain officers or crews for the operation of the vessels caused by strikes, lockouts, labor shortages, etc.

We think we have said enough, and more than enough to show that there is here no ownership pro hac vice; consequently, that the Agent, since it is neither a general owner nor an owner pro hac vice, cannot possibly be regarded as the employer of crews.

We do not stop to discuss the cases in the lower courts cited by counsel. Such, for example, as the Del Norte and the Charlotte and others. An examination of them will show that in each case the charterer (not a mere agent, mind you) had complete command, possession and control of the boat. They are, moreover, all unusual cases, like a yacht, for example. They are not in the ordinary run of commercial business. In such a business practically the only arrangement resulting in ownership pro hac vice is the typical bareboat charter.

A time-charterer has infinitely more control over a vessel than does the Agent here. In an ordinary time-charter, the charterer has the full use of the vessel; loads her with whatever kinds of cargo he wants; for whatever rates of freight he can get; loads and discharges her where and as he pleases (subject only to the master's supervision with respect to the safety and seaworthiness of the ship); sends her on

whatever voyages he wants to, within the designated trading limits; requires the master to sign bills of lading in whatever form and at whatever rate of freight the charterer chooses (without prejudice, of course, to the charterparty); may load the ship entirely with his own cargo or treat her as a general ship and carry the cargo of other shippers for hire,—and yet, in spite of all these acts of control, he is not an owner pro hac vice, and the master and the crews are not his employees, but remain the employees of the general owner.

If this Court, in order to give petitioner Hust the right to a jury trial against this Agent, should hold that this Agency Agreement made the Agent an owner pro hac vice, and thus an employer of Hust, we submit it would go very far beyond anything hitherto ever considered.

Finally, we suggest that a seaman is entitled to know clearly, and without doubt, *who* his employer is. That employer has always been the owner, either actual or *pro hac vice*. Now, for the first time in history, to declare a mere agent like this an "owner" and therefore an employer of the crew, would create nothing but doubt and confusion in the minds of seamen, owners, agents and everybody else. For in all future agency agreements the question would arise: Who *is* the employer? And in this uncertainty no one would fare worse than the seamen themselves.

FOURTH: WHAT DOES THE AGENT NOT DO UNDER THE PRESENT AGENCY AGREEMENT THAT HE DID (a) IN PRIVATE OPERATION OF HIS OWN SHIPS, OR (b) IN THE OPERATION OF GOVERNMENT SHIPS UNDER FORMER OPERATING AGREEMENTS? AND WHAT WAS THE AGENT'S COMPENSATION UNDER THE PRESENT AGREEMENT?

These questions were suggested by Mr. Justice Black and we shall attempt to answer them. We are not quite certain, however, whether Mr. Justice Black wished us to contrast the functions of the Agent under the present Agreement, with his functions as a private owner of his own ship, or whether he wished the contrast to be between the present agreement and previous operating agreements of Government ships. We, therefore, answer both. And first will answer (a).

The contrast may be generally stated thus: The private operator of his own ship can do any lawful thing with it that he pleases. The Agent under this present Agreement attends only to the business of the vessel, and even then only as directed by the War Shipping Administration. The Agent is continually under the supervision and direction of the War Shipping Administration. To contrast the two positions more graphically, we present them in parallel columns:

Private Owner—Normal Peacetime Operation	General Agent—under GAA 4-4-42
1. Can sell, mortgage or otherwise dispose of the ship; or charter her, either as a "bareboat" or "on time" or for "the voyage".	1. Agent has no such rights.
2. Owner solicits cargoes and freight in a peacetime operation.	2. This being a war operation W.S.A. usually designated and provided the cargoes.
3. Owner specifies the voyages, the ports of call, route, destination, etc.	3. W.S.A. does these things. Agent does not.
4. Owner can change voyage and deviate.	4. Agent has no such authority. W.S.A. has.
5. The "venture" is the "venture" of the owner. The profits and the losses are his.	5. The Agent has no interest in the venture; neither the profits nor losses are his.
6. The owner can lay up the ship if he chooses. . .	6. The Agent must continue to furnish the services required by the G.A.A. . .
7. The owner makes such repairs to the vessel as he chooses when, as and if he pleases. He can keep her "in class" or not.	7. The agent has no such rights or discretion. The W.S.A. Maintenance and Repair Division handles all repairs. Cf. Tripp, R. 125 and Article 14 of the Agreement. R. 159.
8. Owner equips, victuals, supplies and maintains vessels as he pleases.	8. Agent equips, victuals, supplies and maintains vessels "subject to directions, orders, regulations, supervision and inspection" of W.S.A. Article 3A(c) of the Agreement.
9. Owner mans the vessel. The master is his employee, and as such engages the crew as employees of the owner.	9. Agent does not man the vessel. The master is employee of the United States, and as such engages crew as employees of the owner—the United States.
10. Owner may issue instructions to the master on management and navigation of the vessel.	10. Agent has no authority to give such instructions to the master. These instructions proceed from the W.S.A.

Private Owner—Normal Peacetime Operation	General Agent—under GAA 4-4-42
11. The owner issues its own bills of lading.	11. Agent signs bills of lading in form prescribed by W.S.A.: "For the Master By ..... Agents for United States of America (W.S.A.)" Article 3A(e) and Page 272 "Compilation of Standard Contract Forms".
12. Owner makes all arrangements or contracts for stevedoring.	12. W.S.A. makes contracts with stevedoring companies. It has a master contract with them.
13. Owner arranges his own insurance of all kinds or may operate vessel without any insurance.	13. W.S.A. provides all insurance including P and I.
14. Owner has the rights of a salvor and prosecutes claims for salvage on his own account and for the crew.	14. The Agent has no such rights or duties. See Article 19 of the Agreement. R. 157.
15. Owner can limit his liability under the limitation of liability laws.	15. Whatever liabilities the Agent may have, — he cannot limit them.

The foregoing, while perhaps not all, afford a clear illustration of the many differences in the two situations.

Now we answer (b), i. e., "What is the difference between this Agreement and former ones?"

Of course former agreements are not in the record, nevertheless we shall do our best to answer. In the first place, the purposes to be accomplished by the present agreement were entirely different from those to be accomplished under previous agreements. Previous agreements were devised for commercial, peacetime operations, on regular lines or routes, and when the national policy was for *private* operation of ves-

sels. The G.A.A.—4-4-42 agreement was devised for war-time operation of the ships, carrying principally military cargoes, and sailing wherever required for logistic support of the armed forces, and when the national policy required complete control by the Government. In the second place, even the titles of former agreements were different from the present. The former agreements were designated "operating agreement", or "managing agreement" or "agency agreement for managing and operating vessels". The agreement between the United States Shipping Board Merchant Fleet Corporation and Southgate Nelson Corporation, which was the one involved in the Quinn case, is called "Operating Agreement, 1935". The present agreement is entitled; "*Service* Agreement for Vessels of Which the War Shipping Administration is Owner or Owner Pro Hac Vice". But the differences go much deeper than the mere titles. In former agreements the Agent "manned", *managed and operated the vessels.* In the present agreement there is no "manning", and there is a distinct separation between the "business" of the vessel and the "vessel" herself. The Agent in the present case manages and conducts only the *business* of the vessel. Articles 1 and 2. The *navigation* and *management* of the *vessel* itself is in the "full control" of the master. Article 3A(d). This is different from the former agreements because in them the agent undertook not only to "manage and conduct the business", but also undertook to *manage and operate the vessel herself.* An illustration of this is the Agency Agreement in Quinn v. Southgate Nelson Corp., 121 F. (2d) 190, affirming 36 F. Supp. 873.

There the Agent manned the ship, and not only agreed to "manage, operate and conduct the business of the line", but also agreed to "operate the vessels". It may also be noted that in our present agreement the Agent is expressly declared to be a mere agent and not an independent contractor,—a declaration which was missing from former agreements. Also, the Agent's compensation was different in former agreements; even going to the extent of sharing in the profits in some cases. See U.S.S.B.E.F.C. v. Greenwald, 16 F. (2d) 948, 951.

We do not wish to be understood as implying that in former agreements the Agent was the employer of the crew. So far as we know, that precise question was not decided, and certainly never by this Court, even though the Agent in those previous cases "manned" the ship. If he did it merely as Agent for the United States, and not for his own account, he would not be the employer; although he might be liable for negligence in not selecting a proper crew, or for breach of his contract to do so. Be that as it may, in the present case, for the reasons already so often stated, we think the non-employer status of the Agent is clear.

Mr. Justice Black asked to be informed what was the Agent's compensation under the present agreement. We have looked that up. It was fixed by the War Shipping Administration's General Orders 12 and 34, and as they were published in the "Federal Register", the Court may take judicial notice of them. General Order 12 was promulgated June 10, 1942,

and was published in the "Federal Register" June 16, 1942, as Document 42-5546. It continued in effect, with various supplements here immaterial, until December 31, 1943, at which time it was superseded by General Order 34, which was published in the "Federal Register" on Tuesday, January 4, 1944, at Page 110. Although General Order 12 thus became ineffective December 31, 1943, it was nevertheless republished in the "Federal Register" on May 30, 1944. Apparently the reason for this was that it had had, during its life, so many supplements, 16 in all, that it was thought wise to codify it and republish it for easy reference by those who still had questions which had arisen during its life, and therefore were governed by it.

In reading these Orders, it should be understood that there are, in general, four classes of agents covered by them; (1) the General Agents (as in this case); (2) Agents; (3) Berth Sub-Agents; and (4) Sub-Agents. Confusion is apt to arise between the words "General Agents" and the word "Agent". The "General Agents" were those who attended to the business of vessels of which the War Shipping Administration was owner or owner pro hac vice, as in this case. The "Agents" were those who attended to the same duties (except procuring master and crews) on vessels time-chartered to the War Shipping Administration. Both General Agents and Agents received the same compensation (which, by the way, illustrates what a minor part of the General Agent's duties was the procuring of the crew. For the Agent,

on a time-chartered ship, who had nothing to do with crews, nevertheless got the same amount of compensation as the General Agent). The "T.C.A.", or Time Charter Agency Agreement may be found on Page 341 of the "Compilation of Standard Forms of the War Shipping Administration", printed by the Government Printing Office for use of the House Committee on the Merchant Marine and Fisheries, 1945.

These General Orders 12 and 34 will be easier to understand if it is realized that the General Agent's and Agent's duties were to "husband" the ship. For this they received flat fees. The handling of cargo was a separate function usually performed by the Berth Sub-Agent, and for this 2½ cents, or 10 cents, or 15 cents, etc., as the case might be, per "handled ton" was paid. If the General Agent or the Agent, besides performing the "husbanding" duties, also attended to the handling of the cargo, he, instead of the Berth Sub-Agent, could receive the compensation for so doing. In short, whoever handled the cargo got paid for it on the basis of "handled tons". These General Orders are somewhat complicated, and we are not too expert in them ourselves, but we believe the foregoing explanations are correct.

To come now to the precise question: The General Agent's Compensation. This is covered in General Order 12, in Paragraph 9 (§306.9 in the revised codified form). The General Agent (or Agent in the case of a time-chartered ship) was paid on the basis of "payable tons of the vessels handled during each such month", according to the following scale:

First 80,000 tons 50¢ per payable ton per month.
Next 40,000 tons 40¢ per payable ton per month.
Next 40,000 tons 30¢ per payable ton per month.
Next 40,000 tons 25¢ per payable ton per month.
Next 50,000 tons 20¢ per payable ton per month.
Over 250,000 tons 15¢ per payable ton per month.

Paragraph 10 (§306.10 of the revised codified form) provides for the revision of this scale upward if it appears that it is insufficient, together wth the General Agents' other earnings, to cover overhead expenses.

Conversely, Paragraph 11 (§306.11 of the revised codified form) provides for a "recapture", or scaling down, of the compensation if the War Shipping Administrator determines that it has been excessive.

General Order 12 in its original form did not provide for renegotiation, but in its revised form it did, in §306.69(c), unless the recapture clause had already taken care of any excess compensation.

As already stated, this Order No. 12 was superseded by General Order 34 on December 31, 1943. This too provides for recapture and renegotiation. The principal change made by the new Order was that instead of the General Agent's compensation being on the "basic scale" above described, it was $65 a day for husbanding the ship, and $15 a day for accounting (§306.72(a) and (b) of General Order 34).

ARTICLE 7 OF THE GENERAL AGENCY AGREEMENT

We discuss this because of Mr. Justice Rutledge's interest in this Article.

Article 7 of the General Agency Agreement provides that the United States shall reimburse the General Agent for all expenditures in "performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder". This merely means that when the Agent, acting as agent on behalf of the United States, makes expenditures for these items, it will be reimbursed.

This Article also provides that "to the extent not recovered from insurance", the United States shall reimburse the Agent for all crew expenditures, including all disbursements for wages, overtime, etc., and for maintenance, cure, "damages or compensation for death or personal injury or illness . . . ."

We think it clear that this merely has the same effect as the first part of Article 7,—namely, that when the Agent, acting as agent, makes such expenditures for the Government, he shall be reimbursed.

With respect to "damages or compensation for death or personal injury or illness", the question of reimbursement under Article 7 actually does not arise. For all such claims were covered by the Wartime P and I Agreement of December 1, 1942, which the Government provided pursuant to Article 8 of the G.A.A.

This P and I Policy is printed in full, with its addenda, at Pages 775-799, inclusive, of the Compilation of Standard Contract Forms of the War Shipping Administration, printed in 1945 by the Government Printing Office for the use of the Committee on Merchant Marine and Fisheries.[1]

This was the policy in effect at the time of petitioner's injury (See Clause V), and see the reference to Fulton Group (Clause 1), and plaintiff's Exhibit 17, Record, P. 148. In actual effect, it was a management contract with underwriters, for the premiums paid under Clause VI are readjusted under Clause VII, whereby the United States pays all losses, and the Underwriters retain only 10 per cent of the excess of premiums over losses and management expense; and, by Clause II of Addendum No. 2 (Page 797 of Compilation) the underwriters must return to the United States any part of this 10 per cent in excess of $300,000.

It is to be noted from Clause VIII (Page 778) that the Underwriters are to provide "claims service". That is of course why the Assistant General Counsel for War Shipping Administration instructed respondent to take Hust's claim up with the P and I Underwriters. (Plaintiff's Exhibit 17, Record, P. 147-8).

It will also be noted the General Agent had authority to settle life, injury or illness claims directly only up to a limit of $250 each. (Clause IV(b) of Ad-

[1] An ample supply of these documents is on hand at the Office of the Committee, and we requested the Document Clerk to send one to the Clerk of the Court.

dendum No. 1, Page 795 of Compilation). The Underwriters had authority up to $25,000, and claims in excess of that figure could be made only on approval of the War Shipping Administration. (Article X, Page 779 of Compilation).

Thus, we think Article 7 of the General Agency Agreement is entirely consistent with the Agent being an agent, and that any payments to be made are made as an Agent for the United States. We do not think it was intended by this Article to make the Agent liable to a direct suit by a seaman to recover for injuries. The House Committee on Merchant Marine and Fisheries, which was familiar with the General Agency Agreement, did not think so, for they said, in reporting on Public Law 17:

> "The only modification thereof arises from the remedeial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. Ths procedure is appropriate in view of the fact that *the suits will be against the Government of the United States.*"

We point out also that Article 7 was never regarded by the seamen's unions as having anything to do with defining the status of the seamen and their relation to the Government. It was only Article 3A(d) which was incorporated into the Statement of Policy which the Administration signed with the unions. This alone was the clause which the unions regarded as defining the seamen's status, and this alone was the clause which they printed in the union pamphlet (Pages 47, 48 of Exhibit 15.)

SIXTH: MR. FREEDMAN'S BRIEF

The burden of Mr. Freedman's brief is that respondent was an owner pro hac vice. That argument we have already answered. But on Page 6 of his brief occurs the following paragraph, which requires brief notice:

> "Under the general maritime law before the Jones Act the *vessel* and her *owner* were liable to the crew for damages due to unseaworthiness or the failure to supply and keep in order proper appliances. *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483. The Jones Act (46 U.S. C. A. 688, 1920) incorporated into the maritime law the Federal Employers Liability Acts. Respondent contends that the suit in the instant case is brought solely under the Jones Act and must be brought against the employer. Aside of the fact that such a relationship is presented in all these cases, it must be noted that such a suit by a seaman is not brought solely under the Jones Act but rather under the maritime law as modified by the Jones Act and these rights are cumulative and not alternative. *Panama R. R. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391; *Brown v. C. D. Mallory*, 122 F. (2d) 98. Thus, the seaman had available to him all the substantive rights in the same action *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. Ed. 1069. All these rights he could assert against the owner of the vessel."

We are not quite sure what Mr. Freedman means by the foregoing. If he means that a seaman, electing to sue under the Jones Act, can sue someone who is not his employer, then he is making an entirely new contention in this case, and is, besides, clearly wrong.

Robinson v. Baltimore Ohio R. R. Co., 237 U.S. 84.
Hull v. Philadelphia Reading Ry. Co., 252 U.S. 475.
Panama R. R. Co. v. Johnson, 264 U.S. 375.
The Norland, 101 F. (2d) 967.
Nolan v. General Seafoods Corp., 112 F. (2d) 515.

But we take it Mr. Freedman does not mean this, but rather that a seaman, suing under the Jones Act, can sue the owner of the vessel *because such owner is his employer*. And then Mr. Freedman proceeds to develop his argument that the respondent here was owner pro hac vice, and therefore suable. That argument, as stated, we have already answered.

In view of the ambiguities of Mr. Freedman's paragraph above quoted, we deem it proper to state our own view of the law. Prior to the enactment of the Jones Act, the seaman had certain rights under the general maritime law. These were stated in The Osceola, 47 L. Ed. 760, and are well understood. A seaman could not sue for damages caused by the negligence of the master or of the crew, since these latter were fellow servants. This prevented nearly all suits for damags because the injuries were nearly always caused by the negligence of the master or of the crew. Then along came the Jones Act—a part of the Merchant Marine Act of 1920. It greatly increased the seaman's rights, for it gave him an action for negligence, abolished the hitherto almost insurmountable defense of fellow servant, declared that these new rights should be enforced by jury trial and forbid re-

moval to a Federal Court. This was accomplished by incorporating the Federal Employers Liability Acts. The seaman could sue under the general maritime law, or he could "elect" to sue under that law, as modified and strengthened in his favor by the Jones Act.

But when the seaman elects to take the very material benefits that the Jones Act added to the maritime law, then he is confronted with one definite requirement — he must show that the *defendant was his employer.* It was in clear recognition of this that petitioner has throughout tried to prove the employer-employee relationship; and as a corollary, has tried to prove that respondent was an owner pro hac vice, and therefore an employer. Recognizing the necessities of petitioner's position, Mr. Freedman was forced to contend at the oral argument that respondent was a "bareboat charterer". Mr. Justice Frankfurter asked him if that were his contention. We made a note of Mr. Freedman's answer. He said yes, that was his contention "precisely".

How far removed respondent was from a "bareboat charterer" we have already shown.

Respectfully submitted,

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